

FOIA Appeals, Policy and Litigation Branch
U.S. Customs and Border Protection
90 K Street, NE, 10th Floor,
Washington, DC 20229-1177

October 17, 2017

Via U.S. mail

Re: Freedom of Information Act Appeal No. CBP-2017-051381

Dear FOIA Appeals Officer:

The Center for Investigative Reporting hereby appeals on behalf of the requester, Mr. Michael Corey pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b)(4) from a denial sent on August 3, 2017 by the U.S. Customs and Border Protection ("CBP").

I. Factual and Procedural History

Since the 2016 presidential debates, there has been extensive reporting and public discussion concerning the United States border wall. *See, e.g.,* Andrew Becker, *Trump's wall is wrong path for immigration reform, analysts say*, REVEAL, Jan. 25, 2017, <https://www.revealnews.org/blog/trumps-wall-wrong-path-for-immigration-reform-analysts-say/>; Michael Corey and Andrew Becker, *Senate Democrats answer questions, raise concerns with Trump's wall*, REVEAL, April 19, 2017, <https://www.revealnews.org/blog/senate-democrats-answer-questions-raise-concerns-with-trumps-wall/>. This has led to increasing concern over CBP's operations at the border, including the amount of federal dollars spent on building a new border wall. In fact, this past year CBP issued a call for contract proposals from private companies for building a new wall. These contract proposals were numbered as follows: HSBP1017R0022, HSBP1017R0023, 2017-JC-RT-001, and 2017-DHS-OCPO-RFI-001.

In his reporting on this issue, Mr. Corey submitted a FOIA request on April 24, 2017 via FOIAOnline.regulations.gov (hereinafter "the Request"). A true and correct copy of the Request is attached as Exhibit A. The Request sought records of CBP related to the contract proposals sent by private companies to bid for the construction of the border wall. More specifically, it requested:

Any and all documents, records, documents, white papers, memoranda and/or alike material related to border fence/border wall contract proposals, i.e. HSBP1017R0022, HSBP1017R0023, 2017-JC-RT-001 and 2017-DHS-OCPO-RFI-001¹ from the date of posting to present. Relevant records include but are not limited to:

- Phase I proposal submissions
- Notifications sent to submitters of proposals, whether successful or no
- Phase II proposal submissions
- All schedules, calendars and itineraries related to prototype presentations
- Any and all recordings of prototype presentations
- Any maps, GIS data, geotechnical data or site conditions information regarding the prototype site
- Any materials related to scoring proposals and/or testing of prototypes and/or mockups
- Results and/or scoring of prototypes and mockups
- Border Patrol-approved design standards for fence/wall
- Aerial and/or satellite photos of the prototype location
- Evaluations, assessments, analyses, summaries, reviews and/or reports regarding the bid, submission, evaluation and prototype process.

See Request. The Request also sought a fee waiver, as CIR is a representative of the news media, as well as expedited processing.

Through the portal, on August 3, 2017, CBP granted the waiver and expedited processing. A true and correct copy of those responses is attached as Exhibit B. That same day, the CBP sent a denial in full, pursuant to Exemption (b)(4) (hereinafter, the “Denial”). A true and correct copy of that response is attached as Exhibit C. The Denial did not elaborate on why the request was denied under Exemption (b)(4).

This administrative appeal is timely pursuant to 6 C.F.R. § 5.8.

II. Argument

Pursuant to Exemption 4 of FOIA, an agency may withhold “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). Here, the requested information does not qualify as a trade secret or as commercial information that is privileged or confidential. In fact, the documents requested were acknowledged and clearly demarcated as “public” and “not confidential.” Moreover, even if any sections did

¹ In the denial, CBP explained that contract 2017-DHS-OCPO-RFI-001 was not issued by CBP but by another department within the Department of Homeland Security. CIR does not contest this issue.

fall under the Exemption, CBP did not release any segregable portions, as required under the FOIA.

A. The requested documents are not protected trade secrets protected under Exemption 4.

Courts have narrowly defined a trade secret as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1289 (D.C. Cir. 1983); *see also Citizens Comm’n on Human Rights v. Food & Drug Admin., Eli Lilly & Co.*, No. 92CV5313, 1993 WL 1610471 at *7 (C.D. Cal. May 10, 1993), *aff’d in part and remanded in part on other grounds*, 45 F.3d 1325 (9th Cir. 1995); *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 617 F. Supp. 279, 285 (S.D. Fla. 1985).

In order for a document to qualify as a trade secret courts find, the withheld information must actually be used in trade related to “the productive process itself,” rather than “collateral matters of business confidentiality, such as pricing and sales volume data, sources of supply and customer lists.” *Pub. Citizen Health Research Grp.*, 704 F.2d at 1287. Additionally, the information must actually be “secret.” *Id.* As one court noted, if the submitter of documents gives the government permission to loan or distribute them to members of the public, “those documents are no longer ‘secret’ for purposes of Exemption 4.” *Herrick v. Garvey*, 298 F.3d 1184, 1194 (10th Cir. 2002). Thus, a requester can merely cite examples of intentions for “actual public disclosure,” and that proof “eliminates the trade secret status of such information.” *Taylor v. Babbitt*, 760 F. Supp.2d 80, 86 (D.D.C. 2011).

Here, no trade secret exists in the requested documents. First, as in *Pub. Citizen Health Research Grp.*, all withheld information is used in “collateral matters of business” such as “pricing and sales volume data, sources of supply and customer lists” regarding the contract proposals for the border wall. Indeed, in CBP’s request for the contract proposals the agency explicitly wrote, “the Government is not open to any form of proprietary design or equipment.” A true and correct copy of CBP’s requests for proposals is attached as Exhibit D, E, F, and G. In these Exhibits, CBP clarified that all contents of the proposals could not be proprietary and therefore they simply must pertain to collateral matters.

Moreover, and more definitively, the requests for the contract proposals regarding HSBP1017R0022, HSBP1017R0023, 2017-JC-RT-001 repeatedly stated that any information gathered through the proposal process would be in the public domain and not confidential. *See* Exhibits D, E, F, and G. For instance, in CBP’s request for HSBP1017R0022, the agency clearly stated, “No parts of this contract are classified.” Exhibit D. It additionally stated, “All such materials are to remain within the public domain.” Exhibit E; *see also* Exhibit F and G (same). Thus – no response was secret and, as in *Taylor*, these examples of intentions for “actual public

disclosure” “eliminates the trade secret status of such information” under Exemption 4.

B. The requested documents are not commercial or financial information that is privileged or confidential.

If information does not qualify as a trade secret, it nonetheless may be protected pursuant to Exemption 4 if it is commercial or financial so long as it is privileged or confidential. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290. Despite the widely accepted breadth of the term “commercial or financial,” the term is not without limits. *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). “[S]imply because [information is] submitted pursuant to a government-to-government cooperative agreement” does not make it commercial. *Id.* Moreover, the requirements of Exemption 4 are not met if the submitted information is “privileged or confidential.” *Nat’l Parks & Conservation Ass’n*, 498 F.2d 765 (D.C. Cir. 1974). While requiring “a private party to submit information as a condition of doing business with the government” makes that submission required,” *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000), where the submission states it will be “public” the private party loses any claims to confidentiality.

Here, the proposals submitted for the border wall are not commercial information pursuant to Exemption 4. “The mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information.” *Chi. Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611, at *2 (N.D. Ill. May 7, 1998). In *Chi. Tribune Co.*, the requested information related to in-flight medical emergencies was provided to the FAA included data about medical emergencies. The FAA redacted information that identified specific carriers under the rationale that the documents were commercial because they concerned aircraft events while “aircraft were in revenue-producing operations.” *Id.* There, Judge Anderson held that such an argument swept too broadly. Similarly, here, claims by CBP that these documents involve commercial information is too sweeping. The border wall is a public project with public consequences. Documents related to this public matter may not be shoehorned into a commercial category.

Moreover, withholding is additionally incorrect under Exemption 4 because the information was not privileged or confidential. In order for the confidential information exception to apply it is *essential* that the information be “privileged” or “confidential.” 5 U.S.C. § 552(b)(4). As discussed in Section A, CBP explicitly wrote in its calls for proposals that all submitted documents would not be “proprietary,” would be in the “public domain” and would “not [be] confidential.” See Ex. D, E, F, and G. These facts alone destroy CBP’s argument for withholding. Indeed, even in cases where documents are marked as “proprietary and confidential,” courts have found that is not enough to substantiate withholding under the Exemption. See *Maydak v. Dep’t of Justice*, 254 F. Supp. 2d 23, 48–49 (D.D.C.

2003) (rejecting an agency's argument that a company's report should be deemed "commercial" merely because it was "labeled" as "proprietary and confidential.")

Lastly, CBP has failed to give any description of the documents, and the justification for applying Exemption 4. Courts have found circumstances like these lead to overturning a withholding under Exemption 4. *See id.* (denying Exemption 4 protection based upon the agency's failure to provide "*any description of the report's content*") (emphasis added).

C. CBP wrongly withheld the documents in full, without disclosing any segregable portions.

The Freedom of Information Act provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Although the agency seeks to withhold documents based upon a FOIA Exemption, "it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)." *See e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011); *North v. U.S. Dep't of Justice*, 774 F. Supp. 2d 217, 222 (D.C. Cir. 2011) (citing *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996)). The agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information. *Mokhiber v. U.S. Dept. of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004) (citing *Army Times Pub. Co. v. U.S. Dep't of Air Force*, 998 F.2d 1067, 1068 (D.C. Cir. 1993)).

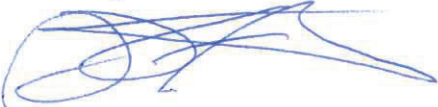
Here, CBP did not fulfill its burden. All documents were withheld in full and CBP merely stated that Exemption 4 applied. It offered no further explanation as to any possible segregability. For argument's sake, even if Exemption 4 did apply to certain sections, there is no doubt that at least certain sections of the proposals were segregable. For instance, general information about the border wall – could not reasonably be described as protected information. Similarly, the location, size, use and costs for the federal government is public information, important and necessary for any citizen attempting to evaluate and understand how public tax dollars are being spent. Where an agency has not provided the documents in good faith but instead "completely withheld" all records courts usually find an exemption was improperly applied. For this reason, the denial should be remanded with instructions for CBP to disclose the required portions.

III. Conclusion

Because Exemption 4 is inapplicable, the Request should be remanded to CBP with instructions to disclose any applicable records responsive to the Request. Should CBP need clarification as to any aspect of the Request, it may reach me at vbaranetsky@revealnews.org or (510) 982-2890.

I look forward to your determination with respect to this appeal within twenty business days. 5 U.S.C. § 552(a)(6)(A)(ii). Thank you in advance for your assistance in this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Victoria Baranetsky', with a stylized, flowing script.

D. Victoria Baranetsky

cc: Michael Corey